

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL C. GRAY,

Defendant-Appellant.

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UNPUBLISHED

June 13, 2006

No. 260811

Wayne Circuit Court

LC No. 97-010478-01

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 5 to 30 years in prison for the armed robbery conviction, and two years in prison for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant raises two issues on appeal. First, he argues that his convictions should be reversed because the victim's identity of his voice at a lineup was unduly suggestive. Second, defendant argues that he was denied the effective assistance of counsel guaranteed him under the Sixth Amendment to the United States Constitution. We address these issues in that order below.

I. The Lineup

Defendant specifically argues that his lineup was unduly suggestive and that the victim's identification of him was based solely on voice recognition, and thus, the trial court erred when it denied his motion to suppress the victim's identification testimony. We disagree.

When considering a ruling on a motion to suppress evidence, we review the circuit court's findings of fact for clear error, giving deference to the circuit court's resolution of factual issues. A finding of fact is clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. We may not substitute our judgment for that of the circuit court or make independent findings. However, the circuit court's ultimate decision on the motion to suppress is reviewed de novo. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). "Questions of law relevant to a motion to suppress evidence are reviewed de novo." *People v Hawkins*, 468 Mich 488, 496-497; 668 NW2d 602 (2003). We will not reverse a trial court's

decision to admit identification evidence unless we find the decision clearly erroneous. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *Hornsby, supra* at 466. The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *Id.* Physical differences among the lineup participants do not necessarily render the procedure defective, and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants; such differences generally relate only to the weight of an identification and not to its admissibility. *Id.* When it is established that a defendant was represented by counsel at a lineup, as defendant was here, the defendant has the burden of establishing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

Identification of an assailant based on his voice must be reasonably positive and certain. *People v Bozzi*, 36 Mich App 15, 22; 193 NW2d 373 (1971). The certainty of the voice identification must be shown to exist “in the mind of the identifying witness by testimony that is, in form, positive and unequivocal; . . . but it must also appear by the existence of some reason to which the witness can attribute his ability to make the voice identification, of which familiarity or peculiarity are the most common example.” *Id.* The degree of certainty of a witnesses voice identification testimony does not depend upon the ability of the witness to describe the peculiarities of the voice in question. *Id.* It is the jury’s job “to determine how much reliance should be placed upon such testimony.” *Id.*, quoting *Commonwealth v Williams*, 105 Mass 62 (Mass, 1870).

Here, at the *Wade*<sup>1</sup> hearing regarding the identification testimony, the victim testified that she did not identify defendant by comparing his physical characteristics with those of the other lineup participants. To the contrary, the victim testified that she instead identified defendant based on his voice. Therefore, defendant’s argument, that the alleged physical differences between him and the other individuals in his lineup made the lineup so impermissibly suggestive that it led to a substantial likelihood of misidentification, fails. *Hornsby, supra* at 466-467.<sup>2</sup>

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<sup>1</sup> *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

<sup>2</sup> However, even considering the evidence presented at the *Wade* hearing, we conclude the lineup was not impermissibly suggestive. The evidence established that defendant was represented by counsel at the lineup, defendant was allowed to change clothes and pick the spot where he wanted to stand in the lineup, neither defendant nor his lineup attorney had any objections to the other men chosen to participate in the lineup, the police gave no indication to the victim that her assailant was in the lineup, and all lineup participants were directed to utter the same phrase two times each before the victim picked defendant out of the lineup as the man who robbed her. The trial court did not err when it denied defendant’s motion to suppress and, in turn, admitted the aforementioned identification evidence. *Hornsby, supra* at 466; *McElhaney, supra* at 286.

Furthermore, the victim established that she was familiar with defendant's voice because her senses were heightened and she was paying particular attention when defendant repeatedly stated, "baby be calm, think about your son," during the incident. The victim indicated that she was "positive" that the person she picked out of the lineup, based on his voice, was the person who robbed her. As a result, the victim's identification of defendant based on his voice was proper. Defendant's arguments that the lineup was unduly suggestive because the voices of the other men in the lineup did not resemble defendant's and because the victim was allowed to view the lineup participants when they spoke, therefore fail. *Bozzi, supra* at 22.

## II. Ineffective Assistance of Counsel

Defendant's second and final issue on appeal is that he was denied his constitutional right to the effective assistance of counsel. For the reasons discussed below, we disagree.

When reviewing a claim of ineffective assistance of counsel, without the benefit of an evidentiary hearing, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, we review the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which a court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to present additional evidence only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Id.* Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections, *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003), or for failing to make a futile motion or argument, *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

We reject defendant's arguments that he was denied his right to the effective assistance of counsel when his trial counsel failed to present evidence that when defendant was arrested he was wearing a plaid shirt and blue pants, which differed from what the victim described her assailant wearing, and when his trial counsel failed to reveal that defendant was much taller and heavier than the man the victim described. Since the victim testified that her assailant was wearing a dark jacket and dark pants, and the police testified that defendant discarded a dark jacket while they were chasing him, defense counsel was not ineffective for failing to dwell on defendant's plaid shirt (because it was covered by the later discarded dark jacket) and blue pants (blue pants are dark). *Toma, supra* at 302-303; *Dixon, supra* at 398. Furthermore, not only was evidence presented showing that the victim's height and weight description of the man who

robbed her was different from the police's description of defendant, but also defense counsel cross-examined officer Gayle Johnson-Brown regarding these discrepancies, and made an argument in this regard during closing argument. Thus, defendant was not denied his right to the effective assistance of counsel, especially when the jury had an opportunity to view defendant at trial and compare its observations of defendant to the aforementioned descriptions. *Id.*

We also reject defendant's argument that he was denied his right to the effective assistance of counsel when his trial counsel failed to present evidence that defendant was allegedly the sole member of the live lineup that did not have facial hair. As discussed previously, the victim did not identify defendant based on his physical characteristics, instead, she identified defendant based on his voice. Therefore, whether the lineup participants had facial hair is irrelevant. Because it was sound trial strategy for defense counsel to ignore the aforementioned irrelevant details that would have diluted his other defenses, defendant was not denied his right to the effective assistance of counsel. *Id.*; see, also, *Ish, supra* at 118-119.<sup>3</sup>

Finally, defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to adequately challenge the victim's identification testimony on the basis that the lineup itself was impermissibly suggestive and that the voice identification procedures that were used were flawed. However, the record reflects that at the *Wade* hearing defense counsel vigorously argued that the victim's identification testimony should be suppressed because the lineup was impermissibly suggestive because of the physical characteristic and age discrepancies between defendant and the other members of the lineup. Furthermore, defense counsel briefly argued that the lineup was impermissibly suggestive because the victim identified defendant based solely on his voice, which defense counsel argued was an unreliable method of identification. Furthermore, defense counsel attacked the victim's identification testimony at trial during his cross-examination of witnesses and in his closing argument. Therefore, we conclude that defense counsel's actions in this regard did not fall below an objective standard of reasonableness, and thus, defendant was not denied his right to the effective assistance of counsel. *Toma, supra* at 302-303.

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<sup>3</sup> For similar reasons, we disagree with defendant's argument that he was denied the effective assistance of counsel when his trial counsel failed to present evidence that defendant allegedly had \$5 more on his person than what the victim stated was stolen from her. Here, the victim testified that the man who robbed her took a \$1 bill and two \$10 bills from her, and when the police apprehended defendant, he had a \$1 bill and two \$10 bills on his person. Since a robber is not required to have empty pockets when he embarks on his prey, the fact that defendant allegedly had an additional \$5 on his person when he was arrested is completely irrelevant. Defense counsel's failure to present this evidence does not fall below an objective standard of reasonableness, and thus defense counsel's inactions did not deny defendant his right to the effective assistance of counsel. *Toma, supra* at 302-303; *Dixon, supra* at 398.

Affirmed.

/s/ Michael R. Smolenski

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray